

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Elizabeth Amanda Davenport,)	Civil No. 10cv508 JM (AJB)
)	
Plaintiff,)	Report and Recommendation
v.)	Granting Motion to Dismiss
)	
Michael J. Astrue,)	[Doc. No. 10]
)	
Defendants.)	
)	

Plaintiff, Elizabeth Amanda Davenport, who is proceeding with the assistance of counsel, brings this action under 42 U.S.C. §§ 405(g) and 1383(c)(3) for review of the final decision of the Commissioner of Social Security (“Commissioner”), in which the Commissioner denied the Plaintiff’s application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. § 1382c. This matter is before the United States Magistrate Judge for a report and recommendation on Defendant’s Motion to Dismiss Plaintiff’s Complaint (Doc. No. 10). For the reasons that follow, the undersigned RECOMMENDS that the Court GRANT Defendant’s Motion based upon Plaintiff’s failure to timely-file her Complaint.

Procedural History

On March 17, 2006, Plaintiff filed an application for supplemental security income (SSI) under Title XVI of the Social Security Act, alleging disability beginning February 1, 1990. The claim was denied initially on June 19, 2006 and upon reconsideration on January 2, 2007. On June 26, 2008, an

1 administrative law judge (ALJ) denied Plaintiff's application in a written decision made after a hearing.
 2 *See* Doc. No. 10-2, Declaration of Joan Devera, p.3, ¶ (3)(a)) (hereinafter "Declaration"); Doc. No. 10-3,
 3 Exhibit 1. The Plaintiff requested review of the ALJ's decision from the Appeals Council. *See* Doc. No.
 4 10-2, Declaration, p. 3, ¶ (3)(a). On June 24, 2009, the Appeals Council denied Plaintiff's request for
 5 review of the ALJ's decision and copies of the Appeals Council denial were sent to Plaintiff and to her
 6 counsel of record. *See* Doc. No. 10-2, Declaration, p. 3, ¶ (3)(a); Doc. No. 10-3, Exhibit 2.

7 The Appeals Council denial informed the Plaintiff of her right to appeal the decision to the
 8 district court, informed the Plaintiff that she had to commence such action within 60 days of the notice,
 9 and that the Social Security Administration assumed receipt of the notice 5 days from the date it was
 10 issued. Doc. No. 10-2, Declaration, p. 3, ¶ (3)(a); Doc. No. 10-3, Exhibit 2, pp. 2-3.

11 On October 20, 2009, the Plaintiff requested a 30-day extension of time to file her complaint.
 12 Doc. No. 10-2, Declaration, p. 3, ¶ (3)(b). On January 29, 2010, the Appeals Council granted Plaintiff
 13 an additional 30 days to file and noted that it assumed Plaintiff received the letter 5 days after the date of
 14 the letter. Doc. No. 10-2, Declaration, p. 3, ¶ (3)(b); Doc. No. 10-3, Exhibit 4. Per the January 29, 2010
 15 Appeals Council Notice, the Plaintiff had until March 5, 2010 to file her complaint in this court. The
 16 Plaintiff did not seek a second extension. Doc. No. 10-2, Declaration, p. 4, ¶ (3)(c). The Plaintiff did not
 17 file a her complaint in this action until March 9, 2010. Doc. No. 10-2, Declaration, p. 4, ¶ (3)(d); Doc.
 18 No. 1, Complaint.

19 On August 20, 2010, the Defendant filed the instant Motion to Dismiss. Doc. No. 10. Citing 20
 20 C.F.R. §§ 416.1401, 422.210(c), and the January 29, 2010 letter, the Defendant asserts the Plaintiff had
 21 thirty days from February 3, 2010, within which to file her Complaint. The Defendant maintains that the
 22 Plaintiff's Complaint, which was due on or before March 5, 2010, was not filed until March 9, 2010,¹

23
 24 ¹ Mailing of the Complaint does not constitute the commencement of an action. Instead, "[a]
 25 civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. "[A] complaint is
 26 deemed to be filed when it is tendered to the clerk of the appropriate court." *New Boston Dev. Co. v.*
 27 *Toler*, 999 F.2d 142, 142 (6th Cir.1993); Fed. R. Civ. P. 5(d)(2) ("A paper is filed by delivering it: (A)
 28 to the clerk; or (B) to a judge who agrees to accept it for filing, and who must then note the filing date
 on the paper and promptly send it to the clerk."). The "prisoner mailbox rule" does not apply to Plaintiff
 because she is not a prisoner. *See Cowden v. U.S. Dep't of Labor*, No. Civ .A.04CV53JMH, 2005 WL
 1691036, at *8 n. 10 (E.D. Ky. July 18, 2005) ("The *Houston v. Lack* 'mailbox rule' does not apply to
 the instant plaintiff, because he is a non-prisoner."); *Banks v. Astrue*, No. 1:09CV-00022-J, 2009 WL
 2046861, at *4 (W.D. Ky. July 13, 2009) (finding a social security plaintiff's complaint to be filed on the

1 and is therefore untimely by four days. Additionally, the Defendant asserts that Plaintiff has not alleged
 2 a permissible basis to permit the Court to extend the limitations period. Consequently, the Defendant
 3 asks this Court to dismiss Plaintiff's Complaint as untimely. The Plaintiff has not filed an opposition to
 4 the Defendant's motion.

5 Discussion

6 The Commissioner moves to dismiss all of Plaintiff's claims for failure to state a claim upon
 7 which relief can be granted, contending that the Plaintiff's claims are barred by the statute of limitations.
 8 The statute of limitations defense may be raised in a motion to dismiss, but only where "the running of
 9 the statute is apparent from the face of the complaint," and the motion should be granted "only if the
 10 assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that
 11 the statute was tolled." *Durning v. First Boston Corp.*, 815 F.2d 1265, 1278 (9th Cir. 1987). The issue of
 12 equitable tolling must be addressed when "the complaint, liberally construed in light of our 'notice
 13 pleading' system, adequately alleges facts showing the potential applicability of the equitable tolling
 14 doctrine." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir.1993) (emphasis added).

15 On a motion to dismiss for failure to state a claim, all material allegations in the complaint will
 16 be taken as true and construed in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792
 17 F.2d 896, 898 (9th Cir.1986). When granting a motion to dismiss for failure to state a claim, a court is
 18 generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was
 19 made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*,
 20 911 F.2d 242, 246-47 (9th Cir.1990). In determining whether amendment would be futile, a court
 21 examines whether the complaint could be amended to cure the defect requiring dismissal "without
 22 contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc.*, 912 F.2d
 23 291, 296 (9th Cir.1990). Leave to amend should be liberally granted, but an amended complaint cannot
 24 allege facts inconsistent with the challenged pleading. *Id.* at 296-97.

25 Under the doctrine of equitable tolling, a plaintiff may be permitted to file a claim after the
 26 sixty-day period has expired in those rare cases where fairness requires it, such as when the defendant

27
 28 date the Clerk received the complaint rather than on the date it was mailed because there is "no authority
 for the proposition that a free citizen is legally entitled to operation of the mailbox rule (i.e., her
 complaint should be treated as filed when mailed)").

1 fraudulently conceals the cause of action, or when there is excusable delay by the plaintiff. *Bowen*, 476
 2 U.S. at 479; *Vernon*, 811 F.2d at 1278. Equitable tolling focuses on the plaintiff's excusable ignorance
 3 of the limitations period and is "not available to avoid the consequences of one's own negligence."
 4 *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir.1998). However, equitable tolling is not
 5 available when the plaintiff was represented by counsel during the relevant period of time.²

6 In the instant case, the Defendant aptly points out in its moving papers that the Plaintiff was
 7 represented by the same experienced³ disability attorney for her entire Social Security disability benefits
 8 claim and continues to be represented by that same attorney in this case. According to the Social
 9 Security Administration ("SSA") notices, Plaintiff's attorney received copies of the April 6, 2009
 10 Notice of Decision-Unfavorable and the September 23, 2009 and January 29, 2010 Notices of Appeals
 11 Council Action from the SSA. *See* Def.'s Mot. Ex. 1.

12 In the Complaint, the Plaintiff alleges that she actually received the January 29, 2010 letter on
 13 February 8, 2010, after Section 422.210(c)'s five-day grace period. However, the date of receipt is
 14 presumed to be five (5) days after the date of such notice, unless there is a reasonable showing to the
 15 contrary. *See* 20 C.F.R. § § 404.901, 422.210(c); *see also Hyatt v. Heckler*, 807 F.2d 376, 378 (4th
 16 Cir.1986), *cert. denied*, 484 U.S. 820, 108 S.Ct. 79, 98 L.Ed.2d 41 (1987) [Upholding sixty day time

17
 18 ² *See Leorna v. United States Dept. of State*, 105 F.3d 548, 551 (9th Cir.1997) (addressing
 19 equitable tolling in the context of the Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794 and stating:
 20 "However, once a claimant retains counsel, tolling ceases because she has gained the means of
 21 knowledge of her rights and can be charged with constructive knowledge of the law's requirements");
 22 *see also Garfield v. Astrue*, 2008 WL 5221095, at *8 (N.D. Cal. Dec.12, 2008) (citing *Leorna* in
 23 denying tolling of 42 U.S.C. § 405(g), and not reaching the issue of plaintiff's alleged mental illness,
 24 stating: "[B]ecause plaintiff retained counsel ... the court need not reach whether grounds existed for
 25 tolling the limitations period ..."); *Vitt v. Astrue*, 2008 LEXIS 14674, at *5, 2008 WL 425936 (N.D. Cal.
 26 Feb. 14, 2008) (citing *Leorna* in denying tolling of 42 U.S.C. § 405(g) and stating: "Plaintiff, who was
 27 represented by counsel, had enough information to file her social security disability appeal on time.
 28 However, she and her attorney did not do so. Equitable tolling is not available to avoid the consequences
 of Plaintiff's negligence or that of her counsel"); *see also Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d
 890, 896 (1st Cir.1992); *Daughterity v. Traylor Bros., Inc.*, 970 F.2d 348, 353 n. 8 (7th Cir.1992);
Beshears v. Asbill, 930 F.2d 1348, 1351 (8th Cir.1991); *McClinton v. Alabama By-Products Corp.*, 743
 F.2d 1483, 1486 n. 4 (11th Cir.1984); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012-13 (4th Cir.1983),
cert. denied, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984); *Kocian v. Getty Refining & Mktg.*
Co., 707 F.2d 748, 755 (3d Cir.), *cert. denied*, 464 U.S. 852, 104 S. Ct. 164, 78 L.Ed.2d 150 (1983);
Keyse v. California Texas Oil Corp., 590 F.2d 45, 47 (2d Cir.1978); *Edwards v. Kaiser Aluminum &*
Chemical Sales, Inc., 515 F.2d 1195, 1200 n. 8 (5th Cir.1975).

³ The Defendant states that a PACER search of Attorney Mary Mithcell's name in the Southern
 District of California brings up 103 cases against the Commissioner of Social Security (or Health and
 Human Services before the Agencies split). *See* Motion to Dismiss at 5, n. 3, [Doc. No. 10].

1 limitation]; *Hunt v. Schweiker*, 685 F.2d 121, 122-123 (4th Cir.1982) [same]. While equitable tolling of
 2 the limitations period may be appropriate under some circumstances,⁴ the Plaintiff has not made any
 3 argument for equitable tolling in this case. Indeed, the time for responding to the Defendant's motion to
 4 dismiss has now expired, without Plaintiff filing any response to the motion whatsoever. *Lanning v.*
 5 *Astrue*, Slip Copy, 2010 WL 3448623 D.S.C.,2010.

6 The Court agrees with Defendant that the Plaintiff's Complaint was due on or before March 5,
 7 2010, and based upon the foregoing finds the Complaint is time-barred under Title 42 U.S.C. § 405(g).


8 Conclusion

9 After a thorough review of the record and the papers submitted and based on the reasons set
 10 forth
 11 above, this Court hereby **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED**.

12 This Report and Recommendation is submitted to the United States District Judge assigned to
 13 this case pursuant to 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and
 14 serve a copy on all parties on or before **February 2, 2011**. This document should be captioned
 15 "Objections to Report and Recommendation." Any reply to the objections shall be filed and served on
 16 or before **February 17, 2011**.

17 IT IS SO ORDERED.

18
 19 DATED: January 19, 2011

20 
 21 Hon. Anthony J. Battaglia
 22 U.S. Magistrate Judge
 23 United States District Court
 24
 25
 26
 27
 28

⁴ See *Bowen v. City of New York*, 476 U.S. 467, 480, 106 S. Ct. 2022, 90 L. Ed.2d 462 (1980)